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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 832

EDWARD W. NELSON,

Petitioner,

—v.—

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1961.

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MOORE-McCORMACK LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in a case which holds that a shipowner may terminate a voyage in breach of shipping articles at a port not permitted by the articles and discharge a seaman, without liability for proper damages, and, moreover, neglect and refuse to pay him his accrued wages then due, without liability for extra wages as provided by 46 U. S. C., Section 596.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Murphy, *J.*) (R. 26a-33a) is reported at 201 F. Supp. 40. The opinion of the Court of Appeals (R. 78a-79a) is reported at 297 F. 2d 936, and is appended hereto.

Jurisdiction

The date of the judgment of the Court of Appeals was January 2, 1962 (R. 78a) and it was entered on the same day (R. 80a). The jurisdiction of this Court is invoked under Section 28 U. S. C. Section 1254 (1).

Questions Presented

Petitioner was a radio operator who signed shipping articles on one of respondent's ships, calling for a voyage from San Francisco to various ports in South America and "back to a final port of discharge on the west coast of the United States, for a term of time not exceeding nine calendar months" (R. 26a). The ship proceeded from San Francisco to South America and then to the port of New York where, less than three months from its beginning, respondent purported to terminate the voyage and discharged petitioner (R. 27a). Respondent, however, did not pay petitioner his accrued wages, insisting that before it would do so, petitioner must sign a general release (R. 18a); the Shipping Commissioner informed petitioner that he could receive his wages if he signed the general release "under protest" (R. 29a).

The first question presented is whether a shipowner may breach a seaman's contract of employment, as the District Court held was here done, by terminating a voyage in New York when the shipping articles specifically called for the port of final discharge to be one on the west coast of the United States, and incur no liability to the seaman other than the payment of transportation from the port of improper discharge to a port on the west coast, plus wages and subsistence for the period of transportation.

The opinions of both courts below unavoidably raise, without satisfactorily answering, the question why, in view

of adjudged breach of contract, the seaman is not entitled to his lost wages and subsistence for the period fixed by the shipping articles as their term, the voyage not being sooner ended by return to a west coast port.

The second question presented is whether a shipowner, without liability for extra wages as provided by 46 U. S. C. Section 596, may neglect and refuse for more than five years to pay earned and accrued wages to a seaman upon his discharge, because the seaman, believing that he has a claim against the shipowner for breach of contract, declines to sign a general release even under protest, but offers to give a receipt for the monies due him.

Statutes Involved

46 U. S. C. Section 564 First provides:

> "The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:
>
> First. The nature and, as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate."

46 U. S. C. Section 596 provides:

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts."

Statement

This action was brought by petitioner, a seaman, to recover damages for his improper discharge in breach of shipping articles, and extra wages for failure to pay his earned wages when due, under 46 U. S. C., Sections 596 and 597; the District Court for the Southern District of New York had jurisdiction under 28 U. S. C., Section 1333. The decree of the District Court (R. 5a), affirmed by the Court of Appeals, awarded petitioner his wages which had been withheld for more than five years, $185.00 provided by his union's contract for transportation, wages and subsistence to San Francisco, and "denied recovery on the balance of his claims against respondent."

The basic facts of the case are undisputed; it is the characterization of those facts and the conclusions of law which the courts below drew which call for review by this Court.

The petitioner was discharged at New York, on November 14, 1955 (R. 32a)[1] from his employment under shipping articles signed on August 23, 1955 which provided that the port of final discharge of the vessel had to be on the west coast of the United States, and that the voyage, if not so terminated, could not extend beyond nine months. The ship did not return to the west coast during the term of time limited by the articles (R. 28a). Petitioner was unemployed from November 15, 1955 to after May 22, 1956, nine months from the date of the opening of the articles (R. 9a).

These facts are undisputed and it is also undisputed that at the time petitioner was discharged, respondent owed him $1,083.06 for wages, no part of which sum was paid to petitioner for more than five years following November 15, 1955 (R. 33a). In fact, the wages were never paid to petitioner, but were deposited with the clerk of the District Court below on July 7, 1961, after the decision of that court and almost six years from the time they were earned and required by statute to be paid to petitioner.

The District Court held that petitioner "is correct insofar as he charges respondent with a breach of the articles in terminating at a place not within the articles, but we disagree with his contention as to the consequences that attend that breach, in support of which, we note, he cites no apposite authority" (R. 30a). Contrary to the district judge's statement, petitioner did cite cases in support of his contention that the proper measure of damages for such breach of shipping articles was wages, overtime and

[1] The opinion of the Court of Appeals appears to ignore the fact that it was on November 14 that petitioner was discharged and seems to suggest that the discharge occurred on October 24.

subsistence for the remainder of the voyage contemplated by the shipping articles. In this case, since the ship did not return to the west coast prior to the maximum time provided for the voyage in the shipping articles, *i.e.*, nine months, those damages should have been paid for the period from November 15, 1955 to May 22, 1956. The cases that establish this measure of damages, cited to the District Court, are *Aird* v. *United States*, 216 F. 2d 149 (3rd Cir. 1954), *Forster* v. *Oro Navigation Co.*, 128 F. Supp. 113 (S. D. N. Y. 1954), aff'd, 228 F. 2d 319 (2d Cir. 1955), and *Yancey* v. *United States*, 77 F. Supp. 600 (S. D. N. Y. 1948).

The District Court distinguished those cases on the ground that there only *some* of the crew were discharged at an improper port and that, therefore, they were entitled to lost wages for the remainder of the voyage which was carried on by other members of the crew who were not discharged, whereas in the instant case, the entire crew was discharged and, therefore, the voyage ended in New York. There can be no question that what the court was saying was that if a shipowner discharges half the crew improperly at a port not permitted by the shipping articles, he is liable to them for the wages that they lose by not being permitted to continue with the vessel, but if he discharges the whole crew at a port not permitted by the articles, he is not liable to anyone for lost wages, because the improper termination of the voyage is effective to end the voyage, and a seaman improperly discharged is entitled only to wages to the end of the voyage.

As damages for the breach of contract, therefore, the District Court held that petitioner was entitled to "$185.00, *the amount fixed by his union's collective bargaining agreement for transportation wages and subsistence to the west coast*" (R. 33a). [Emphasis added.]

While the reasoning of the District Court may respectfully be said to bear some resemblance to that of Lewis

Carroll, the opinion of the Court of Appeals does not even have that internal consistency which derives from changeable *ad hoc* definition of key terms. For the court below, in its *per curiam* opinion said, "We do not find clear error in Judge Murphy's finding of fact that the voyage was terminated in New York, and agree with his conclusion of law that appellant was entitled to no more than the expenses of transportation * * *" It is submitted that two such inconsistent statements cannot be expected to continue to reside peacefully in the same sentence. If the voyage contemplated by the articles was terminated in New York, then there is no occasion to consider the proper measure of damages, which is what Judge Murphy's "conclusion of law", adopted by the Court of Appeals, purported to establish.

Judge Murphy in fact found that "New York was constituted the port of final discharge and the voyage there terminated on the 24th of October, albeit, in breach of the articles" (R. 29a). This is a very different finding indeed from that which the Court of Appeals recites. When the District Court had made *its* finding, petitioner did not, as the Court of Appeals says, argue "that the voyage was not terminated in New York in fact", but; on the contrary, said in his brief that he "had no quarrel with the District Court's determination that respondent breached its contract in New York * * *"[*]

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[*] This statement occurs at the end of a section which begins as follows:

"Before discussing the appropriate measure of damages for such a breach of the shipping articles, a few words should be said about the erroneous findings of fact below as to *when* the voyage was terminated by the respondent." [Emphasis added.]

The full final paragraph of the section reads:

"It seems clear, therefore, that respondent indeed purported to terminate the voyage at the port of New York, but on

The argument made to the Court of Appeals was that the measure of damages determined by the District Court for that breach of contract was wrong. But the court below says nothing about the breach of contract and bases its decision on its statement that the District Court found that the voyage was terminated in New York, when what the District Court found was that the voyage was improperly terminated in New York.

When petitioner was discharged in New York, he asked for his accrued wages in the sum of $1,083.06, but was told by the shipowner that he would have to sign a general release in order to get them (R. 18a). When he applied to the Shipping Commissioner, similarly he was told that to get his wages he would have to sign off the articles under the printed form of general release (R. 19a-21a, 17a), and he was further advised "that, as you did not wish to execute a general release of any claim you might have against the owners and operators of the vessel for alleged breach of contract and unlawful discharge, your retention of this right of action may be evidenced by first inserting the words 'Under Protest' immediately above your signature" (R. 20a).

The Court of Appeals said "The record shows that the shipping commissioner advised appellant that he could reserve his right to contest his discharge by signing 'under protest,' and that appellee was willing to accept such a release." The record also shows that the shipping commis-

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November 12, 1955," not on October 24, 1955. Libelant-appellant, of course, has no quarrel with the District Court's determination that respondent breached its contract in New York; the precise date of its breach should be relevant only to the question of extra wages to be paid by respondent as penalty for failure to pay libelant's wages when he was discharged." (Brief for Libelant-Appellant, in the Court of Appeals, p. 7.)

sioner understandably declined to guarantee his advice (R. 11a), and that petitioner offered several times to sign a receipt for his wages (R. 8a, 10a). The Court of Appeals, however, held that "Appellee was justified in refusing to pay so long as appellant refused to sign the customary mutual release." The court below also held that the signing of a general release "under protest" was a "customary and reasonable requirement," and because petitioner declined to comply with it, he could not enforce the penalty provided expressly by statute for the failure of a shipowner to pay a seaman his earned wages.

Reasons for Granting the Writ

The basic reason why petitioner believes the writ of certiorari should be granted is that, if the decision of the Court of Appeals stands, a shipowner may terminate a voyage at a port not permitted by the articles governing the voyage, and thereby incur no liability to a seaman then improperly discharged. The Court of Appeals has decided either (1) that a voyage required by shipping articles to terminate at a port on the west coast of the United States may nevertheless be properly terminated on the east coast, or (2) that, although such a termination at a port not permitted by the articles is a breach of contract, no damages may be recovered by a seaman wrongfully discharged at the wrong port other than his travel costs to the proper port of final discharge. Either proposition is an extraordinary departure from the established federal law with regard to shipping articles; both are contrary to decision of this Court, or in conflict with decisions of other Courts of Appeals.

The court below similarly has decided petitioner's claim for statutory extra wages in a way (3) that excuses the shipowner's failure, without sufficient cause, to pay earned

wages when due, contrary to the decision of this Court, and in conflict with decisions of other Courts of Appeals.

1. If the opinion of the Court of Appeals means that the voyage contemplated by the August 23, 1955 shipping articles which specified a port of final discharge "on the west coast of the United States" was properly terminated in New York, the decision not only reverses the District Court's determination on that point, but, more pertinently, is in clear conflict with decisions of the Court of Appeals for the Fifth Circuit. For that Court of Appeals held in *Bernuth, Lembcke Company* v. *Sergeant*, 217 F. 2d 704 (5th Cir. 1955) that where shipping articles called for a voyage to end at a port "on the East Coast of the United States", termination of the voyage at Houston was a breach of contract. The court said, 217 F. 2d, at 706:

> "It cannot be disputed that the United States has a western coast, a southern coast and an eastern coast. As a matter of simple geography, Houston is a port on the southern, not the eastern, coast of the United States.
>
> "Whatever might have been their motive, those in control of the vesse. contracted with libellants to make a voyage which would terminate on the eastern coast. The voyage was terminated on the southern coast in violation of that contract * * *".

The same Court of Appeals, in *The Cubadist*, 256 Fed. 203 (5th Cir. 1919), *cert. den. sub nom. Gordon* v. *The Cubadist*, 249 U. S. 618 (1919), held that a voyage was not terminated in accordance with shipping articles which stipulated a final port of discharge in the United States, north of Hatteras, where the ship, on returning to the United States, discharged all its cargo in Mobile, but had not touched at any port north of Hatteras. See also *Jenkins* v. *United States Emergency Fleet Corporation*, 268 Fed. 870 (D. C. W. D. Wash. 1920); *The Ipswich*, 46 F. 2d 136, 138-9 (D. C. Md. 1930).

It seems obvious that the requirement of 46 U. S. C. Section 564, *supra*, p. 3, that shipping articles specify "the port or country at which the voyage is to terminate" would be completely nullified, if regardless of such specification, the ship were free to terminate someplace else.

2. If the opinion of the Court of Appeals is construed as affirming the District Court's holding that "Libellant is correct insofar as he charges respondent with a breach of the articles in terminating at a place not within the articles", then the similar affirmance of the District Court's measure of damages for such breach is contrary to decision of this Court and in conflict with the decision of the Courts of Appeals for the Third and Fifth Circuits, and strangely enough, the Second Circuit.

It should first be said that the District Court and the Court of Appeals in fact awarded *no* damages to petitioner for the breach of contract. The opinions of both courts purport to be awarding him $185.00 as "the expenses of transportation (including wages and board for the travel time) to the west coast" (R. 33a). Bearing in mind that the Court of Appeals said "We adopt Judge Murphy's reasoning in support of this conclusion in his opinion [ ]", we must turn to the District Court's opinion. Judge Murphy makes it clear that petitioner was entitled to this amount because it was "fixed by his union's collective bargaining agreement for transportation, wages and subsistence to the west coast" (R. 33a).

The same opinion, however, creates the impression that the $185.00 was being awarded as damages, for it says: "In this case the consequences of respondent's termination in breach of the articles was to entitle the crew to their discharge and to transportation to the west coast together

with wages and board incident to that journey. * * * Libelant's damages here are exactly what respondent offered him from the very beginning" (R. 31a-32a).

The district judge's reasoning, adopted by the Court of Appeals, therefore, was that for the shipowner's breach of contract, petitioner was entitled to his *discharge*, which he didn't want, and to transportation and subsistence to his home port, which his union's contract gave him in any event.

This is undoubtedly the only case in admiralty in which both the District Court and the Court of Appeals *award* a seaman his *discharge* contrary to his wish, because the shipowner has breached the shipping articles. Other cases, in this Court, and in other Courts of Appeals, after finding that a seaman has been wrongfully discharged, have proceeded to determine the *damages* to which he was entitled. *The Steel Trader*, 275 U. S. 388 (1928), rev'g *United States Steel Products Co.* v. *Adams*, 13 F. 2d 614 (5th Cir. 1926); *Aird* v. *United States*, 216 F. 2d 149 (3rd Cir. 1954); see also *Forster* v. *Oro Navigation Co.*, 128 F. Supp. 113 (S. D. N. Y. 1954), aff'd, 228 F. 2d 319 (2d Cir. 1955).

The Court of Appeals for the Fifth Circuit in the *United States Steel Products Co.* case stated the rule of damages to be:

> "In the absence of a statute requiring a different result, after the entering upon the voyage provided for in the shipping articles the ship is pledged to the complete execution of the contract, and may be proceeded against for nonperformance, and if a seaman is discharged without justifiable cause before the termination of the voyage he is entitled to full indemnity, which may be measured by the stipulated wages for the entire voyage and the amount of expenses in returning to the port of discharge, deducting what he earned, or reasonably could have earned, in other employment during the period of his engagement." 13 F. 2d at 616.

In reversing, this Court impliedly approved the rule of damages stated by the Court of Appeals for the Fifth Circuit, but held that damages in that case were to be limited because there was "a statute requiring a different result": R. S. 4527, [now 46 U. S. C. 594] provided liquidated damages of one month's wages when the wrongful discharge occurred within a month of the commencement of the voyage. Where the wrongful discharge has occurred more than a month after the voyage begins, as in the instant case, the Court of Appeals for the Third Circuit, in *Lind v. United States*, held that the seaman "was entitled to recover as damages for his illegal discharge, basic wages and overtime and found as well as transportation from New York to his home port" for the remainder of the stipulated voyage. 216 F. 2d at 150.

The Court of Appeals for the Second Circuit, also, prior to the instant case, followed the same rule of damages for wrongful discharge as the Courts of Appeals for the Fifth and Third Circuits have established. In *Lowden v. Orr Navigation Co.*, 228 F. 2d 319 (2d Cir. 1955), the court adopted and affirmed Judge Bondy's statement that "Since the plaintiff was wrongfully discharged he is entitled to wages until the end of the voyage (April 10, 1951) less any wages he earned or could have earned". 128 F. Supp. 115, at 118. And it will perhaps bear repetition at this point that the wrongful termination of a voyage which makes the seaman's discharge illegal cannot serve also as the "end of the voyage" which marks the date to which lost wages are computed. See p. 6 *supra*. As the cited cases show, it is the end of the voyage *as fixed by the articles* which establishes the terminal date to which lost wages are to be paid.

3. With respect to the question of penalty wages for the shipowner's failure to pay petitioner's earned wages, the Court of Appeals has held that as a condition of payment,

the shipowner may require the seaman to sign a release with language whose legal consequences the seaman cannot know. This decision that a seaman's wages may be withheld without penalty because he will not sign a "general release", no matter how qualified, is in clear conflict with decisions by the Court of Appeals for the Fourth Circuit which hold that no condition other than the signing of a receipt for monies received may be imposed and, once again, with prior decisions of the Second Circuit itself, which applied the same rule. *Prindes v. S.S. African Pilgrim*, 266 F. 2d 125, 128 (4th Cir. 1959); *The Corapeak*, 46 F. 2d 262 (4th Cir. 1931); *The Lake Gaither*, 40 F. 2d 31, 34 (4th Cir. 1930); *Forster v. Oro Navigation Co.*, 128 F. Supp. 113 (S. D. N. Y. 1954), aff'd, 228 F. 2d 319 (2nd Cir. 1955).

In *The Corapeak*, the court said, 46 F. 2d at 262:

> "This court has had occasion to discuss the question of withholding seamen's wages in numerous cases, a resume of which will be found in the Lake Gaither, 40 F. (2d) 31. A reading of these decisions will show that it has been repeatedly held that no condition may be imposed on tender of wages due, but in this case we find a tender made of all wages due with no other condition attached than that a receipt be given for "all wages", a receipt which the captain of the ship certainly had a right to demand upon payment."

The Court of Appeals for the Second Circuit in the *Forster* case followed precisely the same rule with which it is now in conflict, for it affirmed there, 228 F. 2d 319, Judge Bondy's statement that "The tender of wages to the plaintiff was not sufficient since it was made upon a condition other than the signing of a receipt for money received". 128 F. Supp. at 116.

Furthermore, this Court in *McCrea v. United States*, 294 U. S. 23 (1935), has held that a seaman's departure

from the vessel without leaving his address, at the time when his earned wages should have been paid, furnishes the "sufficient cause" which 46 U. S. C. Section 596 allows as excuse to the shipowner for failure or neglect to make payment of earned wages. But, contrary to that decision, the District Court here, affirmed by the Court of Appeals, has held that even though the seaman was on the ship after his wages were due, and, having been ordered off the ship, left his address with the shipowner after he had demanded his wages, the shipowner nevertheless had "sufficient cause" to refuse to pay him his wages. The decision below, therefore, is not only in conflict with the decision of the Court of Appeals for the Fourth Circuit on the question of the shipowner's right to impose conditions on payment of wages, but it is also contrary to the decision of this Court as to what is "sufficient cause" to withhold payment.

CONCLUSION

The Court of Appeals for the Second Circuit, which traditionally has been a major source of decision on maritime law, has decided important questions in admiralty by a *per curiam* opinion, depriving seamen of employment rights previously governed by the terms of shipping articles required by statute and of statutory wage payment rights. These determinations are contrary to decisions of this Court and in conflict with decisions of other Courts of Appeals. This petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted,

MURRAY GARTNER
Counsel for Petitioner

Dated, New York, New York,
March 30, 1962

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 144—September Term, 1961.

EDWARD W. NELSON,

Libelant-Appellant,

—v.—

MOORE-McCORMACK LINES, INC.,

Respondent-Appellee.

Before:

LUMBARD, *Chief Judge,*
MOORE and HAYS, *Circuit Judges.*

Appeal from denial of recovery in seaman's action for damages for breach of shipping articles and penalty under 46 U. S. C. 596 for failure to pay accrued wages within statutory period. Decree of the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*, affirmed.

MURRAY GARTNER, New York, N. Y., *for libelant-appellant.*

JOHN J. CROWLEY, New York, N. Y. (Francis I. Fallon and Burlingham, Hupper & Kennedy, on the brief), *for respondent-appellee.*

PER CURIAM:

Appellant on August 23, 1955 signed on appellee's vessel as radio officer under articles calling for a voyage from San Francisco to various points "and back to a final port of discharge on the west coast of the United States, for a term of time not exceeding nine months." On October 24, 1955, the vessel purported to terminate its voyage by discharging cargo and paying off its crew in New York. Appellant claims that it was error for the trial court to refuse him damages in the form of wages for the rest of the maximum nine-month period, arguing that the voyage was not terminated in New York in fact, and that in any event his articles entitled him to wages until such time within that period as the ship returned to the west coast. We do not find clear error in Judge Murphy's finding of fact that the voyage was terminated in New York, and agree with his conclusion of law that appellant was entitled to no more than the expenses of transportation (including wages and board for the travel time) to the west coast which appellee paid all the other members of the crew and offered to pay appellant. We adopt Judge Murphy's reasoning in support of this conclusion in his opinion reported at —— F. Supp. —— (S. D. N. Y. 1961).

Appellant also attacks the denial of penalty wages under 46 U. S. C. 596 for appellee's failure to make prompt payment of his accrued wages at the time of his discharge. On this point we also affirm on the reasoning in the opinion below. Appellee was justified in refusing to pay so long as appellant refused to sign the customary mutual release. The record shows that the shipping commissioner advised appellant that he could reserve his right to contest his discharge by signing "under protest," and that appellee was willing to accept such a release. As appellant did not choose to comply with this customary and reasonable requirement, he cannot enforce the penalty.

Affirmed.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of January one thousand nine hundred and sixty-two.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
Circuit Judges.

EDWARD W. NELSON,
Libelant-Appellant,

—v.—

MOORE-McCORMACK LINES, INC.,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk

Decree of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 188-353

EDWARD W. NELSON,

Libelant,

—against—

MOORE-McCORMACK LINES, INC.,

Respondent.

This cause having regularly come on to be heard on February 21 and 23, 1961 before the Honorable Thomas F. Murphy, United States District Judge, upon the pleadings and proofs addduced by the respective parties hereto, and having been argued and submitted by the respective advocates; and the Court after due deliberation having rendered its decision on the 14th day of June, 1961 directing that the libelant recover judgment against respondent in the amount of $1,083.06 for accrued wages, plus $185.00 for transportation, wages and subsistence and otherwise denying a recovery to the libelant;

Now, on motion of Burlingham, Hupper & Kennedy, proctors for respondent, it is

ORDERED, ADJUDGED AND DECREED that libelant Edward W. Nelson recover of and from respondent Moore-McCormack Lines, Inc. the sum of $1,083.06 for his accrued wages plus $185 for his transportation, wages and subsistence making

a total of $1,268.06, without interest and without costs, and that libelant have execution therefor; and it is further

ORDERED, ADJUDGED AND DECREED that libelant is denied recovery on the balance of his claims against respondent.

At New York, New York
in the Southern District of
New York, on the 22nd day
of June, 1961

THOS. F. MURPHY
U.S.D.J.

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 832

EDWARD W. NELSON,

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—against—

MOORE-McCORMACK LINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

EUGENE UNDERWOOD
Counsel for Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

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MOORE-McCORMACK LINES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner, lacking in frankness, fails to tell the Court the basic fact that his assignment to respondent's vessel was only temporary, pending the return of the regular radio operator who had left the job temporarily because of a death in his family. The District Court found:

> "The regular radio officer, because of whose absence libelant was temporarily assigned to the ship, had not as yet returned from his home on the west coast, and libelant was therefore cleared by his union for a coastwise trip lasting from October 25th to November 13, 1955 (27a).*

When the foreign voyage was terminated at New York on October 24 and all the crew except the petitioner signed

* Numbers with suffix (a) refer to petitioner's appendix in the Court of Appeals.

off the articles, petitioner was cleared by his union for the coastwise voyage only because the regular radio operator had not returned. However, as the District Court found:

> "On November 14th the regular radio man had returned and new articles were to be opened that day for a foreign voyage" (27a).

Therefore, it is quite apparent that petitioner lost his temporary job because the regular man, whose job it was, returned to the ship, and not because of any breach by respondent of its duties under the articles. Indeed, as the District Court said:

> "Libelant does not dispute the right of the vessel to terminate the voyage prior to the expiration of that *outside time limitation*, but only disputes the owner's right to terminate at a *place* different than that specified in the articles" (30a; italics ours).

All the District Court held was that, in a case where the seaman* does not deny the shipowner's right to terminate the articles *when* it did, but only *where*, and, since the seaman would have lost his temporary job anyway because of the return of the regular man, the seaman's only damages flowing from the shipowner's termination of the articles at a *wrong place* was the cost of transporting the seaman back to a *right place*.

This is especially so since the schedules in the union collective bargaining agreements provided for just that (27a).

The Court of Appeals, *per curiam*, held only that the District Court had rightly concluded that respondent in fact terminated the voyage in New York, and that peti-

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* It is of some significance that this petitioner was at that time a law student. He has since become a member of the bar.

tioner is entitled to no more by reason of respondent's breach

> "than the expenses of transportation (including wages and board for the travel time) to the west coast which appellee paid all the other members of the crew and offered to pay appellant" (Petition, p. 17).

No new rule of law has been laid down by either Court.

Petitioner cites no conflicting decision since the only issue is one of *quantum* of damages and petitioner lost no wages because he would have had to give up his job to the regular man in any event.

The cases cited by petitioner (p. 12) and others were amply distinguished by the District Court, as follows:

> "The other line of cases cited by libelant involve seamen's actions for wrongful discharge in which the measure of damages was held to be, *inter alia*, wages until the end of the voyage that continued subsequent to the discharge of the particular seaman. (Citing cases.) The distinction is that here the voyage was terminated as to the entire crew, all of whom were discharged. Wages until the end of the voyage in substance is what was offered and paid to all of them, except libelant who declined ultimately to accept it" (31a).

Concerning Penalty Wages

Petitioner, still lacking in frankness, claims that respondent refused to pay him his dues unless he signed a "general release". This is not true. The form he was asked to sign is a Government form of "mutual" release (17a).

This is a form which the Shipping Commissioner requires the master, as well as the seamen, to sign before payment of wages. The District Court said:

> "It was shown also that the mutual release that respondent required was the form that the shipping commissioner made seamen sign in the event they did not sign off of the articles themselves. We find as a fact that respondent was willing to accept such a release even with the 'under protest' notation and that payment was not therefore made conditional upon the waiver of any legal rights of libelant. * * * Libelant was not asked to waive a disputed claim" (33a).

The Court of Appeals said:

> "As appellant did not choose to comply with this customary and reasonable requirement, he cannot enforce the penalty" (Petition, p. 17).

It is only an arbitrary refusal to pay wages that gives rise to penalties. *McCrea* v. *United States*, 294 U. S. 23, 30. Neither court below attempted to change this established doctrine. The District Court held that petitioner's wages were always available to him if he would sign the Government form required by the Shipping Commissioner "under protest" and that "libelant was not asked to waive a disputed claim" (33a); *ergo*, the non-payment of wages was not arbitrary (32a-33a).

The Court of Appeals held only that:

> "Appellee was justified in refusing to pay so long as appellant refused to sign the customary mutual release. The record shows that the shipping commissioner advised appellant that he could reserve his right to contest his discharge by signing 'under protest,' and that appellee was willing to accept such a release. As appellant did not choose to comply with this customary and reasonable requirement, he cannot enforce the penalty" (Petition, p. 17).

No new law has been made. The case involves only a question of quantum of damages on a most unusual state of facts. This Court's attention is not merited and the petition should be denied.

Respectfully submitted,

EUGENE UNDERWOOD
Counsel for Respondent

Dated: New York, N. Y.
April 27, 1962

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IN THE

Supreme Court of the United States

October Term, 1961

No. 832

EDWARD W. NELSON,

Petitioner,

—v.—

MOORE-McCORMACK LINES, INC.,

Respondent.

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Summary Reply

It is distressing to be charged by counsel so eminent as is Mr. Underwood[1] with lack of frankness before this Court, particularly since the matters which counsel conceives should have been told the Court in the petition not only were *not* relied on by the courts below, but indeed can only be made to appear relevant by distortion of those courts' decisions. A five page Brief in Opposition may be thought to demonstrate physically that no substantial issues are raised. But any such demonstration must fail when, in order to achieve that objective, it is apparently found neces-

[1] Counsel who tried this case for the respondent in the District Court and briefed and argued it in the Court of Appeals are not on the Brief in Opposition.

sary to ignore the issues actually raised by this case, as stated in the petition, and to state fictitious straw issues by attributing to the lower courts decisions which they did not make.

The courts below did not decide, as respondent contends, (1) that petitioner was not entitled to wage damages because he would have lost his job anyway to another radio operator or (2) that petitioner was properly denied payment of his earned wages because he would not "sign the Government form required by the Shipping Commissioner". (Brief in Opposition, p. 4.)

(1) The District Court held that petitioner was improperly discharged, not that he would have lost his job anyway.

What respondent calls "the basic fact", that petitioner's "assignment to respondent's vessel was only temporary" was not made the basis of decision by the District Court for the very good reason that the terms of petitioner's job were fixed by his contract with respondent, the shipping articles which defined the voyage for which he was hired, and not by any purported definition of the job derived from the union assignment slip, which simply made him available to sign those articles (1aa). Moreover, the Union's port agent agreed that even the assignment slip called for the completion of the two foreign voyages for which petitioner was engaged, and he said "I am taking no position as to whether those two foreign voyages terminated. That is for you lawyers" (2aa, 3aa).

That is what the District Court decided—that the second foreign voyage on which petitioner was engaged was terminated in "breach of the articles", that the voyage did not

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Numbers with suffix (aa) refer to petitioner's additional appendix in the Court of Appeals.

end in the manner specified and required by the articles, and that, therefore, petitioner was improperly discharged.

In that part of the District Court's opinion which holds that there was a breach of contract and then considers the rule of damages applicable to such breach (R. 30a-32a), not a single word suggests that the court was deciding, as respondent puts it, that "since the seaman would have lost his temporary job anyway because of the return of the regular man, the seaman's only damages flowing from the shipowner's termination of the articles at a *wrong place* was the cost of transporting the seaman back to a *right place*." (Brief in Opposition, p. 2.) The District Court said nothing of the kind, and neither did the Court of Appeals, since it did no more than adopt the District Judge's reasoning—discovery of any such ground of decision in either of the opinions below will defy the closest search.

What the District Court did hold, in attempting to distinguish the line of cases cited by petitioner "in which", as that court said "the measure of damages was held to be, *inter alia*, wages until the end of the voyage that continued subsequent to the discharge of the particular seamen" (R. 31a), was that "Wages until the end of the voyage in substance is what was offered and paid" because "the voyage was terminated as to the entire crew" (R. 31a), "in breach of the articles" (R. 30a). In other words, the District Court, in form of words, recognized that the established measure of damages includes wages to the end of the voyage, but by equating "end of voyage in accordance with the articles" with "end of voyage in breach of the articles" denied to petitioner the wage damages to which he was entitled because of his unlawful discharge. Peti-

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Nor does the decision rest in any way on the fact that there was a "death in the family" of the other radio operator (Brief in Opposition, p. 1) or that petitioner was a law student as well as a radio operator (Brief in Opposition, p. 2).

tioner need add nothing here to what he said at pages 11-13 of the petition; but respondent, apparently unable to respond to those reasons for granting the writ, has chosen to argue that this Court should not review a decision which neither the District Court nor the Court of Appeals made.

The findings which respondent recites to support its own conclusion that "the seaman would have lost his temporary job anyway because of the return of the regular man", namely that "libelant was . . . cleared by his union for a coastwise trip lasting from October 25th to November 13, 1955" and that "On November 14th the regular radio man had returned and new articles were to be opened that day for a foreign voyage" (Brief in Opposition, pp. 1-2), were not relied on by the District Court as any basis for its decision, and certainly not adverted to in any way by the Court of Appeals. The first finding was specifically challenged on appeal, because there is not a suggestion of any evidence in the record to support it (Libelant-Appellant's Reply Brief in the Court of Appeals, p. 4), and the Court of Appeals makes no reference to it.

The second finding is used by respondent—not by the District Court or the Court of Appeals—to imply that petitioner would have lost his job anyway because of the return of the other radio man. But even under the assignment rules of his union—let alone the fact that it was the shipping articles which controlled the terms of the job—that radio operator could not claim the job unless he returned to the ship at the port where he left it: San Francisco, not New York (2aa).

Once again, it is sheer fantasy for respondent to suggest that the courts below in any way held that the *quantum* of petitioner's damages was to be reduced to nothing, in respect of wages for the remainder of nine months, the District Court having found that "the ship did not sooner

return to the west coast" (R. 28a), because he would have lost his job anyway; what those courts held was that the *measure* of damages did not include wages for the period during which the voyage specified by the articles would have continued. In simple fact, the courts below have held that although shipping articles specify that a voyage shall continue for nine months unless sooner terminated by final discharge on the west coast of the United States, a shipowner may terminate such a voyage at any port in the world and be liable to seamen thus unlawfully discharged for nothing but transportation to the west coast.[1] This is not a decision on the *quantum* of damages, but on the *measure* of damages: transportation alone, as against, and in conflict with, "basic wages and overtime and 'found' *as well as* transportation" (Emphasis added), *Aird v. United States*, 216 F. 2d 149, 150 (3rd Cir. 1954), or to the same effect, "stipulated wages for the entire voyage *and* the amount of expenses in returning to the port of discharge" (Emphasis added), *United States Steel Products Co. v. Adams*, 13 F. 2d 614 (5th Cir. 1926), *rev'd on other grounds*, 275 U.S. 388, (1928).

There is, in respondent's Brief in Opposition, the most extraordinary repeated reliance on a ground not even stated by the District Court, and certainly not made the basis of its decision by the Court of Appeals—that "petitioner loses no wages because he would have had to give up his job to

[1] To use respondent's phrase, it is "lacking in frankness"—to quote the District Court's statement that "Libelant does not dispute the right of the vessel to terminate the voyage prior to the expiration of the outside time limitation" without making it clear that the District Judge and the parties below understood that petitioner's position is that such a right of prior termination exists only when the vessel is in a permissible port of final discharge, and not when the vessel is in a wrong port. It is precisely because the vessel's return to a proper port is a condition precedent to the existence of a right of prior termination that the District Court held that respondent had breached the articles.

the regular man in any event" (p. 3)—to justify the assertion that the issue is only one of *quantum* of damages. The issue plainly and inescapably, *on the decisions and judgments below*, is whether a seaman is entitled to wages for the unexpired portion of a voyage improperly terminated in breach of articles, as well as transportation to the port of origin, as prior cases in the Second Circuit and cases in the Third and Fifth Circuits have uniformly held, or only to transportation, as the Court of Appeals in this case held.

(2) Neither court below held that the Shipping Commissioner required petitioner to sign a "Government form" in order to get his earned wages.

Under the guise of once again accusing petitioner of lack of frankness, respondent has managed to pack so much confusion in the last page and a half of its Brief in Opposition that it can only be clarified item by item:[1]

a. That the so-called "Government form of 'mutual' release" was mutual if signed by both parties does not detract from the fact that it was a general release as to all claims arising from the voyage. All one has to do is to look at the mutual release to which respondent refers (R. 17a) to see that it *is* such a general release, and to see also that it heads the sign-off page of the shipping articles. It is not a "Government form" in the sense that the Government requires it to be signed; respondent does not, and cannot, cite any law which requires a seaman to sign it.

b. The Shipping Commissioner does not require "the master, as well as the seamen, to sign [the form] before payment of wages." No record reference is given to

[1] All following quotations not otherwise identified are from the Brief in Opposition, pp. 4-5.

this statement, which cannot stand in the face of 46 U. S. C. 644 First.* That statute permits, but does not require, the execution of a mutual release at the time wages are paid, if both master and seaman agree to the settlement, or if, pursuant to 46 U. S. C. 651, any controversy between them has been submitted in writing to the Coast Guard official and the settlement "adjusted by such Coast Guard official." Obviously here no settlement was agreed, nor was the controversy submitted for adjustment.

c. The quotation from the District Court's opinion on page 4 of the Brief in Opposition is completely at odds with the quotation from the Court of Appeals on page 5. The District Court found, contrary to *all* the evidence "that the mutual release that respondent required was the form that the Shipping Commissioner made seamen sign in the event they did not sign off of the articles themselves" (R. 33a). There is no such form. The Shipping Commissioner testified that the form was "routinely used *after a man signed off articles* at the shipping commissioner's office" (Emphasis added) (R. 16a), and respondent's paymaster also testified that what the respondent required was "an indication from the Shipping Commissioner that they have *signed the articles*" (Emphasis added) (R. 16a). And signing off the articles, or signing the articles means signing the release on the sign-off page (R. 17a).

d. The Court of Appeals avoided the embarrassment of pointing out the District Court's error in finding that respondent asked petitioner to sign a form which did not exist and which no one had testified existed, by holding succinctly that "Appellee was justified in refusing to pay so long as appellant refused

*The statute is set out in the additional appendix annexed hereto.

to sign the customary mutual release." But that court in that sentence is referring to the only mutual release which ever was in the case, namely that on the sign-off page of the articles (R. 17a), as to which there is absolutely no finding by the District Court that its signing was "customary" when there was a dispute between master and seaman. On the contrary, the District Court found that the Shipping Commissioner made seamen sign a non-existent form (presumably "customarily" because it was a form) "in the event they did not sign off on the articles themselves" (R. 33a).

e. Far from holding "that petitioner's wages were always available to him if he would sign the Government form required by the Shipping Commissioner 'under protest'" (Brief in Opposition, p. 4), the District Court made it clear that it was the *respondent* who required that petitioner sign a mutual release. Of course, the District Court mistakenly said that "Libelant had refused to sign off on the articles *or* to sign the requested release" (R. 33a) (Emphasis added), since there was no release proferred other than that on the sign-off page. And it was this mistaken belief that there were two kinds of releases which led the District Court to say that "the mutual release that respondent required was the form that the shipping commissioner made seamen sign in the event they did not sign off on the articles themselves," when that form was only a certificate by the Commissioner *to* the shipowner attesting that a seaman *had* signed off the articles.

f. Non-payment of earned wages here when due *was* arbitrary, since it is undisputed that petitioner offered a receipt, and respondent insisted on something other than a receipt. Surely, the District Court's finding that petitioner would not sign a non-existent form can-

not justify respondent's failure to pay. And it is equally difficult to understand the Court of Appeals' holding that it is a "customary and reasonable requirement" before payment of a seaman's earned wages as commanded by statute, to compel the seaman to sign a release "under protest," which notation by hypothesis nullifies the effect of the release as a release.

Neither can this decision, imposing a condition on tender of wages "other than the signing of a receipt for money received", *Forster v. Oro Navigation Co.*, 128 F. Supp. 113 (S. D. N. Y. 1954), aff'd, 228 F. 2d 319 (2nd Cir. 1955), be reconciled with the decisions of the Fourth Circuit cited at page 14 of the petition.

Conclusion

Respondent's failure to answer the petition except by asserting that the court below decided something else, has made this reply brief necessary to demonstrate that respondent is discussing a hypothetical decision, not the one which requires review by this Court.

Relying upon what the court below held, not on what respondent says it held, petitioner respectfully submits that the petition clearly shows that the decision below, on both the question of measure of damages for breach of shipping articles, and the question of penalty wages for inexcusable failure to pay seaman's wages when due, is in conflict with decisions of this Court and with decisions of other circuits. Both questions are of basic importance in maritime law; the petition therefore should be granted.

Respectfully submitted,

MURRAY GARTNER
Counsel for Petitioner

Dated: New York, N. Y.
May 2, 1962.

ADDITIONAL APPENDIX

46 U. S. C., Section 644 First, provides:

"The following rules shall be observed with respect to the settlement of wages:

"First: Upon the completion before a Coast Guard official to whom the duties of shipping commissioner have been delegated, of any discharge and settlement, the master or owner and each seaman, respectively, in the presence of such Coast Guard official, shall sign a mutual release of all claims for wages in respect of the past voyage or engagement, and such Coast Guard official shall also sign and attest it, and shall retain it in a book to be kept for that purpose, provided both the master and seamen assent to such settlement, or the settlement has been adjusted by such Coast Guard official."